Supreme Court, U.S.
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NOs. 92-943 & 92-1211

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CAMPO, JR.
Plaintiff-Petitioner,

versus

ELECTRO-COAL TRANSFER CORPORATION, INC.
Defendant-Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor-Petitioner

versus

CURTIS CAMPO, JR., PLAINTIFF-PETITIONER, AND ELECTRO-COAL TRANSFER CORPORATION, INC.,
Defendant-Respondent

On Petitions for Writs of Certiorari To The United States Court of Appeals For The Fifth Circuit

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Respondent's Consolidated Brief in Opposition To Petitions for Certiorari

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QUESTIONS PRESENTED

Petition Nos. 92-943 and 92-1211 present identical questions arising from the same case:

I. Whether the questions presented by Petitioners merit review under Rule 10 of the Supreme Court of the United States.

II. Whether the Circuit Court of Appeals for the Fifth Circuit was correct in affirming the district court's directed verdict in favor of Respondent on the issue of Petitioner Campo's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C. § 688.

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STATEMENT OF THE CASE

Curtis Campo, Jr., Petitioner, brought suit for personal injuries against his employer, Electro-Coal Transfer Corporation ("Electro-Coal"), under the Jones Act, 46 U.S.C. § 688, and the general maritime law. After hearing all of Campo's evidence on the issue of seaman status, the United States District Court for the Eastern District of Louisiana entered a directed verdict in favor of Electro-Coal. Construing all evidence in favor of Petitioner, the district court concluded that Petitioner was not a seaman under the Jones Act. This determination was affirmed by the United States Court of Appeals for the Fifth Circuit on grounds that Campo was not a seaman because he was not permanently assigned to a vessel or an identifiable fleet of vessels and because Campo was covered by the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. Appendix at A-11.[1] This Court subsequently vacated the first panel decision and remanded the case to the Fifth Circuit for reconsideration in light of Southwest Marine, Inc. v. Gizoni, _____ U.S. _____, 112 S.Ct. 486 (1991). Appendix at A-10. On remand the Fifth Circuit concluded that Campo was not a seaman under the Jones Act because he was not permanently assigned to a vessel or an identifiable fleet of vessels. Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992); Appendix at A-1.

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[1] Petitioners in Nos. 92-943 and 92-1211 filed identical Appendices with the same pagination. The opinions of this Court and the Court of Appeals are reproduced therein. Citations are to Petitioners' Appendices at A-_____. Petitioner National Union Fire Insurance Company is the Longshore compensation insurer of Electro-Coal and filed an Intervention in the lower court.

The uncontested facts established that Campo was a shore-based terminal worker who assisted in loading and unloading bulk cargo at Electro-Coal's terminal in Plaquemines Parish, Louisiana. Electro-Coal's facility is used to transfer and store coal and other cargo. The terminal in question consists of shore-side buildings, a coal storage area, and a dock. Electro-Coal routinely transfers coal from vessel to vessel and between vessels and the shore-side storage area. Barges loaded with coal and other cargo to be discharged are routinely tied to the dock adjacent to the terminal. The cargo is then loaded either on to other barges or sea-going vessels, or stored in Electro-Coal's terminal. Cargo is loaded and unloaded by use of large electric-powered machines, various cranes, and a series of powered conveyor belts.

Electro-Coal's terminal workers are divided into two divisions, an operations division and a harbor boat division. Campo was assigned to the operations division and was classified as an operator trainee at the time of his accident. The operations division consists of shore-based dock workers who are involved with the handling, loading and unloading of cargo. Appendix at A-12-A-13. Campo's primary duties concerned the operation of the different types of equipment used in the cargo transfer process. This equipment is located on the dock and on land. To operate the machinery Campo would sit in the cab of a crane, above the dock, and pull various levers to move cargo on to conveyor belts or to allow the cargo to be let out of the machines into the barge.

The harbor boat division at Electro-Coal consists of a foreman, tug boat operators and deckhands who are permanently assigned to specific vessels. Campo was not assigned to this division. The harbor boat division runs and maintains Electro-Coal's four harbor boats. No evidence was presented suggesting

that Campo was permanently assigned to work aboard any of these vessels as a member of the crew. Appendix at A-4.

Like other marine terminals, thousands of barges and vessels call annually at the Electro-Coal facility to discharge or to load cargo. These cargo-carrying vessels, both river and ocean-going, are owned and operated by many different companies. None of the cargo-carrying vessels are owned by Electro-Coal, with the exception of a single barge, which is used for maintenance and clean up work.

In order to facilitate loading and unloading operations, Campo occasionally boarded barges, removed hatch covers, pumped ballast, and caught and released lines. Campo, however, admitted that these activities were for the sole purpose of facilitating the loading and unloading of cargo. Appendix at A-13. Campo spent most of his time operating a continuous bucket loader, a machine located on the dock and designed to remove cargo from barges. Appendix at A-13.

Campo was injured on a barge, moored at a dock, which he was temporarily aboard to prepare it to take on cargo. Appendix at A-13. A tug was positioned alongside the barge. A line from the tug was used to open a hatch cover on the barge. After the cover was opened, Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, Campo somehow fell into the barge's cargo hold. Appendix at A-13. There was no evidence or proof that Campo was permanently assigned to the tug, or any other vessel, as a crew member nor did Campo perform a substantial amount of his work on vessels. Appendix at A-4-A-5.

Campo brought suit against Electro-Coal under the Jones Act, contending that he was a "seaman." Electro-Coal defended contending, inter alia, that Campo, a shore-based terminal worker assisting in the loading and unloading of vessels, was not a Jones Act seaman, since he was not permanently assigned to any vessels or an identifiable fleet of vessels owned or controlled by Electro-Coal. The district court directed a verdict in favor of Electro-Coal at the close of Campo's case. This determination was affirmed by the Circuit Court of Appeals for the Fifth Circuit. Appendix at A-11. The U.S. Supreme Court vacated the first panel decision of the Fifth Circuit and remanded the case for reconsideration under this Court's decision in Southwest Marine, Inc. v. Gizoni, ____ U.S. ____, 112 S.Ct. 486 (1991) Appendix at A-10. On remand, the Fifth Circuit followed this Court's decisions in Gizoni and McDermott International, Inc. v. Wilander, 498 U.S. 337, 111 S.Ct. 807 (1991). The Fifth Circuit applied the test of seaman status articulated in Wilander and in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), instead of relying upon Pizzotolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988), and concluded that Campo was not a seaman. Appendix at A-1; Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992).

ARGUMENT

I. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.

The questions raised by Petitioners do not merit review nor do Petitioners articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States

to support their argument that this Court should exercise its discretionary power of review. Rule 10 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented by Petitioners relate solely to factual issues, and do not present substantial issues of law as required by Rule 10. The court of appeals' decision is not in conflict with a decision of this Court or of another federal circuit court of appeals, nor has the court of appeals decided a federal question in a way which conflicts with a state court of last resort. There is no evidence that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. In fact, as shown below, the decisions of the lower courts are in full accord with the Jones Act and the precedents of this Court.

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). No such reasons exist in this case. Petitioners are merely dissatisfied with the results below as it affects them as litigants and are attempting to re-argue the case which Petitioners lost below on undisputed facts. This Court has stressed that it does not "sit for the benefit of particular litigants." Rice, 349 U.S. at 74.

II. THE COURTS BELOW CORRECTLY APPLIED THE JONES ACT AND THE PRECEDENTS OF THIS COURT IN FINDING THAT CAMPO IS NOT A SEAMAN.

In Wilander, this Court emphasized that "The key to seaman status is employment-related connection to a vessel." 498 U.S. at _____, 111 S.Ct. at 817. The evidence establishes that Campo, a shore-based crane operator at a marine terminal, was not permanently assigned to a vessel or an identifiable fleet of vessels and therefore lacked seaman status. Following remand from this Court and oral argument by the parties, the Fifth Circuit concluded:

> Campo has failed to identify a group of vessels to which he was permanently assigned or on which he performed a substantial amount of work. Campo describes a six-or-seven-thousand-vessel fleet composed of the small number of Electro-Coal vessels, river barges owned by Mid-South Towing, and ocean barges owned by Gulf Coast Transit.
>
> This grouping fails as a fleet for two reasons. First, Campo did not establish common control of these three groups of vessels. Second, Campo was randomly assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies. It is well established that a large number of variously owned and controlled vessels does not constitute a fleet. See, e.g. Langston v. Schlumberger Offshore Servs., 809 F.2d 1192, 1194 (5th Cir. 1987); Buras, 736 F.2d at 310; Guidry, 640 F.2d at 529.

> Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman. The court properly granted a directed verdict in favor of Electro-Coal.

Appendix at A-4; Campo II, 970 F.2d at 52-53 (footnotes omitted).

Unlike Gizoni, Campo was given every opportunity at the district court level to demonstrate that he might be entitled to Jones Act coverage. After presenting all of his evidence in support of his claim for seaman status, Campo was unable to show a relationship to an identifiable fleet of vessels and the district court granted a directed verdict in favor of Electro-Coal. On reconsideration in light of Gizoni, the Fifth Circuit in Campo II affirmed the district court's holding that "[n]o reasonable jury could find that Campo was a seaman, as he could not show a permanent assignment to, or substantial work on, a fleet of vessels." Campo II, 970 F.2d at 52; Appendix at A-3. The Fifth Circuit correctly upheld the district court's application of Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959), and Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986), which require a party claiming seaman status to show:

1. He was permanently assigned to a vessel or performed a substantial part of his work on a vessel or an identifiable fleet of vessels; and

2. His work contributed to the mission of the vessel or fleet;

Barrett, 781 F.2d at 1074-76.

The case of Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir. 1991), supports the soundness of this conclusion by having emphasized: "A large body of law, developed through a case-by-case application of the Robison test, provides the means for deciding which workers are entitled to the benefits of the Jones Act. Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels." Bach, 920 F.2d at 326 (emphasis added). In Bach II, 947 F.2d 1290, the Fifth Circuit reinstated the Bach I opinion following remand from this Court.

In Wilander, this Court examined the soundness of the Robison test and found it to be the appropriate standard for determining Jones Act seaman status. This Court cited language from Maryland Casualty Company v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938), that "there is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise." 498 U.S. at ___, 111 S.Ct. at 817. Campo put forth no evidence from which a jury could infer that he was permanently assigned to a vessel or an identifiable fleet of vessels. The Fifth Circuit's upholding of the district court's granting of a directed verdict in favor of Electro-Coal is in accordance with this Court's decisions in Gizoni and Wilander. Campo does not qualify as a Jones Act seaman and the district court properly granted a directed verdict in favor of Electro-Coal.

A. THE QUESTION OF SEAMAN STATUS UNDER THE JONES ACT IS A MIXED QUESTION OF LAW AND FACT.

Petitioners incorrectly suggest that the question of seaman status always should be the exclusive province of the jury. Petitioners completely ignore the purpose of a directed

verdict. In Jones Act cases, "a mere scintilla" of evidence is insufficient to present a question for a jury and there must be a conflict in substantial evidence to create a jury question. A directed verdict is appropriate where there is a complete absence of probative facts supporting plaintiff's position. See, e.g., Landry v. Huthnance Drilling Company, 889 F.2d 1469, 1470 (5th Cir. 1989); Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980).

The right to a jury trial does not negate the authority of federal courts to direct a verdict or enter a judgment notwithstanding the verdict for insufficiency of evidence. Galloway v. United States, 319 U.S. 372, 389 (1943) (federal courts have power to direct verdict for insufficiency of evidence even though claimant has right to jury trial); Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 333-35 (1979)(offensive use of collateral estoppel does not violate defendant's right to trial by jury). Petitioners' arguments ignore this Court's recognition that it is proper to direct a verdict when, under the governing law, "there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). In Anderson, this Court noted that judges are not "required to submit a question to the jury...unless the evidence is of such a character that it would warrant the jury finding a verdict in favor of that party." 477 U.S. at 251 (quoting Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). Campo put forth no evidence from which a jury could have inferred that he was permanently assigned to a vessel or fleet of vessels.

In Wilander, this Court stated: "[w]e note that the question of who is a 'member of a crew,' and therefore who is a 'seaman,' is better characterized as a mixed question of law and fact. When the underlying facts are established and the rule of

law is undisputed, the issue is whether the facts meet the statutory standard. See Pullman-Standard v. Swint, 456 U.S. 273, 289, n.19, 102 S.Ct. 1781, 1790, n.19, 72 L.Ed.2d 66 (1982)(defining a mixed question)." Wilander, 498 U.S. at _____, 111 S.Ct. at 818.

This Court went on to note that "member of a crew" and "seaman" are statutory terms and therefore their interpretation would be a question of law. The Court specifically addressed the appropriateness of directed verdicts in Jones Act cases: "Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law would reasonably support only one conclusion." Wilander, 498 U.S. at ____, 111 S.Ct. at 818 (citing Anderson v. Liberty Lobby Inc., 477 U.S. 243, 248 (1986)). Accordingly, the Fifth Circuit did not err in upholding the district court's granting of a directed verdict on the question of seaman status.

Petitioners also suggest that the Supreme Court rejected the applicability of Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969). Campo gives no authority for this bold assertion that this Court rejected the application of Boeing. This argument is pure conjecture and is entirely unsupported by the case law and the record. The district court correctly applied the legal standard for granting a directed verdict, which is the standard of Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) because Campo failed to introduce substantial evidence over which reasonable minds could differ that he was not permanently assigned to an identifiable fleet of vessels.

B. BARRETT v. CHEVRON U.S.A., INC. WAS NOT OVERRULED BY THIS COURT.

Campo concludes that Wilander somehow impliedly overrules the Robison/Barrett test for determining seaman status. The Wilander decision is totally devoid of any language which can be construed to overrule Barrett. Wilander was essentially concerned with the second prong of the seaman status test "that the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission" and not with the first prong of the test which is the prong which was the subject matter of Barrett and this case.

Campo was not a Jones Act seaman because he could not establish a permanent connection to a vessel or an identifiable fleet of vessels. Therefore Campo could not satisfy the first prong of the Robison test, without regard to the Barrett decision's "time test." The "time test" of Barrett simply was not at issue and not relied upon by the lower courts in reaching their conclusions. The Fifth Circuit in Campo II concluded: "Whether the plaintiff relies upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the Robison/Barrett test." Appendix at A-3; Campo II 970 F.2d at 52.

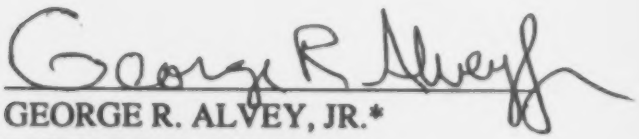
C. CAMPO'S RELIANCE ON PIZZOTOLO IS MISPLACED.

Campo attempts to go beyond the record before this Court to establish facts by relying on the case of Pizzotolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988). In Gizoni, this Court overruled Pizzotolo which was recognized by the Fifth Circuit in Campo II. Accordingly, any reliance on the facts set forth in Pizzotolo as an attempt to show Campo's assignment to a fleet of vessels is inappropriate and should not be before this Court.

CONCLUSION

The questions presented by the Petitioners do not merit review because, as a matter of law and fact, Campo was not a Jones Act seaman since he was not permanently assigned to a vessel or an identifiable fleet of vessels. The decisions of the lower courts correctly apply the Jones Act and the United States Court of Appeal for the Fifth Circuit correctly applied the precedents of this Court in Gizoni and Wilander. Accordingly, Petitioners' second petitions for writs of certiorari to review the second decision of the United States Court of Appeal for the Fifth Circuit should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for all parties by placing same into the United States Mail or Hand Delivery on this the 28th day of January, 1993.

GEORGE R. ALVEY, JR.*

* Counsel of Record

APPENDIX A

APPENDIX: Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.1:

Electro-Coal Transfer Corporation
TECO Energy, Inc.